Supreme Court,
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In the
Supreme Court of the United States

OCTOBER TERM, 1997

HOLSUM BAKERS OF PUERTO RICO, INC.,
Petitioner,

VERSUS

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED

1. Did the Court of Appeals err when it implicitly ruled that the alleged discriminatee did not lose his right to protection under the National Labor Relations Act, or at least his right to the general remedy of reinstatement, after he engaged in egregious, hostile conduct harmful to consumer confidence and threatening to public health and safety which was specifically found to be unprotected?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The parties and attorneys involved in the proceedings in the Court of Appeals for the District of Columbia Circuit are Holsum Bakers of Puerto Rico, Inc. (now a division of Seaboard Corporation), the Petitioner, and the National Labor Relations Board, the Respondent.

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OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit, which is unpublished, appears in the Appendix at A-1.

STATEMENT OF JURISDICTION

The Court of Appeals for the District of Columbia Circuit entered its opinion and judgment on January 10, 1997. On February 21, 1997, the Petitioner timely

filed a Petition for Rehearing, which the District of Columbia Circuit denied on March 10, 1997. Petitioner filed its Petition for Writ of Certiorari within ninety (90) days of the notice of Entry of Judgment denying the Petition for Rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Court of Appeals for the District of Columbia Circuit had jurisdiction to hear Petitioner's Petition for Review of the decision of the National Labor Relations Board pursuant to Section 10(f) of the National Labor Relations Act as amended, 29 U.S.C. §160(f), which provides in pertinent part as follows:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, *or in the United States Court of Appeals for the District of Columbia,* by filing in such a court a written petition praying that the order of the Board be modified or set aside.

29 U.S.C. §160(f)(1973)(emphasis added).

STATUTORY PROVISIONS INVOLVED

The text of the pertinent statutory provisions is set forth below:.

29 U.S.C. § 158

Unfair labor practices

(a) Unfair labor practices for an employer

It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the

employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

STATEMENT OF THE CASE

A. *Reasons for Granting Petitioner's Writ*

The decision of the United States Court of Appeals for the District of Columbia Circuit, as well as the National Labor Relations Board, disregards the inherent danger in reinstating a former employee, a baker, who has engaged in unprotected conduct, as previously held by this Court, the Court of Appeals, and the Board, and whose reinstatement threatens other employees, the employer, and the public at large. The ripeness of this issue for review is illustrated by the recent 6-4 *en banc* decision of the District of Columbia Circuit in *Diamond Walnut Growers, Inc. v. NLRB,* No. 95-1075, ____F.3d____, 155 LRRM 2257 (D.C. Cir. May 20, 1997). The decision of the Appellate Court and the Board in *Holsum* extends the protection of the Act to conduct which both concede is not protected. That extraordinary ruling relies first upon a stipulation to anti-union animus by the Petitioner as the basis of the General Counsel's asserted prima facie case. That stipulation by its specific terms is unrelated to the charging party's claim. Second, the ruling surprisingly treats the passage of time as a catalyst for changing the legally recognized effect of the charging party's conduct from unprotected conduct to protected conduct.

The Board and the Court of Appeals discredited the denial by the charging party that he repeatedly made

egregiously debasing statements about the company's bakery products. This false testimony concering *the critical fact* of the case should not have been ignored by the Board and the Appellate Court. The charging party made the statements, and he lied in denying that conduct. The case law and the decisions of both the Board and the Court of Appeals herein hold that his conduct is not protected and is a legitimate basis for discharge.

The former employee is *not* the only one with rights in this instance. The Petitioner has rights, the other employees have rights, the shareholders have rights, and the general public has rights — and they are deprived of those rights by the instant decision.

B. *Factual Background*

Holsum Bakers of Puerto Rico, Inc. ("Holsum") is engaged in the manufacture and sale of bread and other consumer bakery products. On September 23, 1993, Holsum's employees voted in a National Labor Relations Board ("the Board") election to determine whether they wished to be represented by Congreso de Uniones Industriales de Puerto Rico ("the Union"). The election result as recorded on the Tally of Ballots was: 251 opposed to union representation and 118 in favor of union representation, with forty-five challenges. The Union filed objections.

On October 14, 1993, Holsum issued a disciplinary warning to Carmelo Rivera ("Rivera"), a production employee in the bakery. On December 13, 1993, the Union filed an unfair labor practice charge alleging that the warning was a violation of Sections 8(a)(1) and (3) of the Act. About one year later, on September 29, 1994, Rivera was discharged, and

the Union filed a charge on October 3, 1994, again alleging violations of 8(a)(1) and (3).

The unfair labor practice charges and objections were consolidated for hearing and heard before an Administrative Law Judge (the "ALJ"). On September 14, 1995, the ALJ issued a decision recommending the dismissal of the objections. Unfair labor practices were found in both Holsum's October 14, 1993 warning and its discharge of Rivera a year later on September 29, 1994. Holsum timely filed exceptions, and on February 12, 1996, the Board affirmed the ALJ's findings in all respects.

The District of Columbia Circuit overruled the Board with respect to the disciplinary warning, but affirmed the Board with respect to the discharge finding. Respondent timely filed a Petition for Rehearing, which was denied on March 10, 1997. The following is a summary of the critical facts from the record.

On August 12, 1993, Rivera received a warning for using obscene language and for defaming and denigrating Holsum's supervisors. Approximately two months later, on October 14, just after the election, Holsum issued Rivera another warning for abusive conduct. Specifically, Rivera blew up at his foreman and accused management of wanting to take his money in an angry and menacing tone. Although the Board found this particular warning to be discriminatory, the Court of Appeals overruled that finding concluding that there was an absence of substantial evidence in the record indicating a discrimatory motivation for the warning. The Court of Appeals specifically referred to the August warning for similar conduct as an indication of Holsum's consistency in administering discipline.

Holsum issued Rivera another written warning in June of 1994, after he verbally attacked and insulted a female employee, causing her to cry. Later in the summer, Mr. Julio Vigoreaux ("Vigoreaux"), Vice President of Manufacturing Operations for Holsum, was told that Rivera was making serious derogatory statements regarding the quality, health, and safety of consuming Holsum's baked goods. Specifically, Rivera stated that Holsum's products are "porqueria"—not fit for pigs—filth—unsanitary, and that he would not let his family eat them. Given the nature, and the tenor of the comments about Holsum's products, Vigoreaux began an investigation to (1) ensure the safety of the products and (2) determine if the allegations regarding Rivera's product-related statements were true.

Holsum's investigation revealed evidence from six employees that Rivera not only had disparaged and attacked the company's products but also that he had gone much further by adding that the products were *poison* and "*porqueria.*" Rivera was interviewed along with the other employees in the department.

In his testimony before the Administrative Law Judge, Rivera denied that he had made *any* negative statements about the company's products. However, *the ALJ and the Board discredited his testimony.*

Following the investigation, the company reviewed Rivera's entire disciplinary record. Based on a clear pattern *for over a year* of hostile, contemptuous, and irrational misconduct and the disparaging and malicious statements he made about product contamination, Holsum decided to discharge him. No other employee has ever made such threatening and derogatory statements about the company's product.

ARGUMENT

The facts as found by the Board itself establish without question that Rivera was a hostile, disgruntled, contemptuous, and at times abusive, employee who disparaged his employer's product by labeling it filthy, unsanitary, and even poison. Rivera's statements were not only potentially devastating to Holsum's business, but also posed a threat to the general public. In light of Rivera's established pattern for angry and irrational behavior going back to August of 1993, his comments also suggested the strong possibility that he might tamper with Holsum's product as a way of acting on his hostility toward Holsum. Rivera's conduct also must be analyzed in light of the Board's specific finding that his own testimony under oath was *not credible.*

In spite of the established facts and serious implications of Rivera's conduct, which was found to be unprotected, the Board and the Circuit Court ordered that Holsum reinstate Rivera with back pay, because he mentioned the Union during the same time frame he made the disparaging comments, and because he made them some nine or ten months before his discharge. This result is contrary to the existing legal limitations on protected activity and represents a serious threat to the public and the interests of justice. It also holds that unprotected conduct can be treated as protected simply by the passage of time.

The right of employees to engage in concerted activity is not an unlimited one. One category of concerted activity, recognized by this Court, which falls outside of the Act's protections has been referred to as disloyalty. In *NLRB v. Electrical Workers (Jefferson Standard Broadcasting)*, 346 U.S.

464, 472 (1953), this Court stated that "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer." In *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1066 (D.C. Cir. 1992), the court below cited this principle from *Jefferson Standard Broadcasting* in finding that an employee lost the protection of the Act by participating in a rally advocating the boycott of his employer's products. Under *Hormel*, disloyal conduct is unprotected regardless of whether the conduct otherwise constitutes concerted activity.

Under the *Jefferson Standard* and *Hormel* line of cases, an employer is justified in disciplining an employee for disloyal conduct, even when such conduct occurs within the course of concerted activity. Another line of cases holds that certain conduct can lead to a forfeiture by employees of protection under the Act such that they may no longer seek the Act's protection. In *MacKay Radio*, 96 N.L.R.B. 740 (1951), the Board found that a strike called to compel the employer to accept unlawful contract provisions was itself illegal, and that the employees who participated in that strike had "forfeited their right to the protection of the Act." The Board further found that the participating employees could not claim the protection of Section 8(a)(3), even though the employer was not motivated by their unlawful conduct in taking adverse employment action against them. 96 N.L.R.B. at 743.

Similarly, in *Local 707, Motor Freight Drivers*, 196 N.L.R.B. 613 (1972), the Board barred unfair labor practice charges by strikers who had participated in unlawful picketing, reasoning as follows:

> [W]here the activity engaged in by the employee is . . . an activity which contravenes the policies of the Act, the **employee has forfeited his right to invoke other provisions of the same statute to restore him to his job with back pay.**

Id. at 614 (emphasis added); *see also Rapid Armored Truck Corp.*, 281 N.L.R.B. 371, 382 (1986). These cases all stand for the proposition that an employee who engages in egregious wrongdoing should not be afforded protection under the Act.

The established facts concerning Rivera's conduct cry out for treatment requiring forfeiture under the reasoning just discussed. Rivera's conduct goes well beyond the disloyalty which merely renders concerted activity unprotected under existing jurisprudence. The seriousness of falsely communicating product contamination is evidenced in the United States Code at Title 18 U.S.C. §1365, the Federal Anti-Tampering Act, which *criminalizes* such conduct, providing in pertinent part as follows:

> (c)(1) Whoever knowingly communicates false information that a consumer product has been tainted, if such product or the results of such communication affect interstate or foreign commerce, and if such tainting, had it occurred, would create a risk of death or bodily injury to another person, shall be fined not more than $25,000 or imprisioned not more than five years, or both.

This statute clearly conveys a public policy and purpose to preserve consumer confidence in the food distribution chain,

as well as in other products with which consumers have contact. In short, the statute recognizes the impact on the general public of contamination communications like those made by Rivera. Rivera's conduct, which can be viewed as criminal under the statute, at a minimum created a threat to consumer confidence in Holsum's products, and this conduct should disqualify him from any right to protection, especially reinstatement, under the National Labor Relations Act.

Aside from the nonprotection this Court and others have accorded such statements, there is a deeper and more serious threat arising from Rivera's behavior—that is, the legitimate and reasonable fear by Petitioner of Rivera's *actual* involvement in contamination of the product, given his consistent pattern for over a year of angry, hostile, contemptuous, and irrational conduct. The Board's discrediting of Rivera's sworn testimony establishes that he cannot be trusted in a position which is public safety sensitive. In *Diamond Walnut Growers, Inc. v. NLRB*, No. 95-1075, ____F.3d____, 155 LRRM 2257 (D.C. Cir. May 20, 1997)(*en banc*), the District of Columbia Circuit has just held that an employer was justified in placing a returning striker into a lower paying position based in part on her involvement in a strike which included a campaign attacking the employer's product. *Id.* at 2263. Notwithstanding the worker's engagement in protected activity when the disparagement occurred, in contrast to Rivera's *unprotected* activity in the instant case, the Court recognized that "when a union claims that a food product produced by a struck company is actually tainted it can be thought to be using the equivalent of a nuclear bomb; the unpleasant effects will long survive the battle." *Id.* Moreover, the Court recognized as reasonable the fear that employees who exhibit such hostility to the employer might take action against the employer once back inside the facility in sensitive positions.

The Court did not enforce the Board's order that a food production employee be reinstated into the position of quality control assistant—a sensitive position similar to that of a baker.

The 6-4 *en banc* decision in *Diamond Walnut Growers* strongly supports Holsum's contention that this issue is far from settled and cries out to be heard before this Court. In light of this very recent decision, Holsum's actions seem even more justified given the Board's finding that Rivera's disparagement of the company's product was *not protected activity*. Considering the potential threat to the public from Rivera's employment as a baker, given his continuing pattern of misconduct, it is simply contrary to the interest of justice to recognize Rivera's right to reinstatement.

The Act does not clothe Rivera with an impenetrable suit of armor at the expense of the public's interest nor does the Act bestow rights which are superior to every right of the employer, the employees, and the shareholder owners of the company. Rather, as with all rights, Rivera's rights must be balanced against the interest of the general public and the rights of others. In this case, his conduct threatened the public's interest in both the actual and the perceived safety of the food distribution system. It threatened the employees' livelihood. His virulent, false disparagement of the company's food products reveals a hostility given vent recklessly. His untruthful disparagement of the company's food products and his untruthful denials in his sworn testimony, as found by both the Board and the court below, prove an absence of trustworthiness. The repetitive nature of his misconduct continuing over more than a year demonstrates that it is of lasting duration.

To let the Board's remedy of reinstatement stand creates unreasonable risk to the public; to the reasonable property rights of the company; and to the job security, and possibly the physical security, of the other workers in the plant. The result of recognizing Rivera's right to reinstatement presents a continuous threat to these interests. The Court of Appeals erred in not weighing this balance of favor of the public, and finding that Rivera lost his right to protection under the Act, or at least his right to reinstatement thereunder.

CONCLUSION

To the extent the Court of Appeals for the District of Columbia Circuit found that Petitioner committed an unfair labor practice by discharging Rivera, Petitioner respectfully requests that the Court's decision be reversed. The Court erred by not finding that Rivera lost his right to the Act's protections, including reinstatement, by engaging in egregious conduct both harmful to the public's confidence in the food distribution system and potentially threatening to public health and safety.

At the least, this case should be remanded to the lower court to reconsider its decision in light of its very recent ruling in *Diamond Walnut Growers, Inc. v. NLRB, supra.*

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-1065 **September Term, 1996**

HOLSUM BAKERS OF PUERTO RICO, INC., Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

United States Court of Appeals For the District of Columbia Circuit

FILED JAN 10 1997

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before EDWARDS, *CHIEF JUDGE,* SILBERMAN, *Circuit Judge,* and BUCKLEY, *Senior Circuit Judge*

J U D G M E N T

This case was considered on the record from the National Labor Relations Board and on the briefs and oral arguments of counsel. After full review of the case, the court is satisfied that appropriate disposition does not warrant an opinion. *See* D.C. Cir. R. 36(b). Accordingly, for the reasons stated in the accompanying memorandum, it is

ORDERED AND ADJUDGED that the petition for review and cross-application for enforcement herein are granted in part and denied in part.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D. C. Cir. Rule 41.

PER CURIAM

For the Court:
MARK J. LANGER,
Clerk

By: /s/ Eva Brown
Deputy Clerk

Attachment

MEMORANDUM

Holsum Bakers of Puerto Rico, Inc. petitions for review of the National Labor Relations Board's determination that it engaged in an unfair labor practice in violation of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(1) and (a)(3), when, on October 14, 1993, it issued a final warning to its employee Carmelo Rivera-Rodiguez ("Rivera") and again when, on September 29, 1994, it discharged him. We grant Holsum's petition for review with respect to the October 14, 1993, final warning but deny the petition insofar as it relates to the September 29, 1994, discharge.

Rivera was employed by Holsum for twenty years as a general helper in its production department. During the summer of 1993, Rivera distributed and collected union authorization cards, encouraged employees to join the Congreso de Uniones Industriales de Puerto Rico ("the Union"), and appeared on five or six union-sponsored radio programs. On September 23, 1993, he participated as a union observer at a union representation election, which the Union lost. The events relevant to this petition for review occurred during the twelve months following the election.

Sections 8(a)(1) and (a)(3) of the Act provide, in relevant part, that "[i]t shall be an unfair labor practice for an employer" to interfere with an employee's collective bargaining rights under the Act, 29 U.S.C. § 158(a)(1), or to discriminate "in regard to hir[ing] or tenure of employment...[in order] to encourage or discourage membership in any labor organization." *Id.* § 158(a)(3). To establish that an employer has committed an unfair labor practice in viola-

tion of these sections, the NLRB General Counsel must make a *prima facie* showing sufficient to support the inference that the employee's participation in protected conduct was a "motivating factor" in the employer's adverse action. Once the General Counsel makes that showing, the burden shifts to the employer to demonstrate that the action would have taken place even in the absence of the protected conduct. *See Passaic Daily News v. NLRB,* 736 F.2d 1543, 1552-53 (D.C. Cir. 1984)(citing *Wright Line,* 251 N.L.R.B. 1083, 1089 (1980)). We will not disturb the Board's findings of fact when they are supported by substantial evidence based upon the record as a whole. *Teamsters Local Union No. 171 v. NLRB,* 863 F.2d 946, 952 (D.C. Cir. 1988)(citations omitted).

Because, in this case, Holsum stipulated that it harbored an anti-union animus, *Holsum Bakers of Puerto Rico, Inc.,* 320 N.L.R.B. 834, 834 (1996), we need only determine whether there was sufficient evidence in the record to support the Board's findings that in each instance, the reasons given by Holsum for its disciplinary actions against Rivera were pretextual.

I. OCTOBER 14, 1993, FINAL WARNING TO RIVERA

On October 6, 1993, approximately two weeks after the election, Rivera refused to accept his paycheck from one member of management. In the lunchroom the next day, he berated his foreman in an abusive manner for not giving him the check. Eight days later, and one day after a picture of Rivera and representatives of the Union appeared in a Puerto Rican newspaper of wide distribution, Holsum issued him a "final warning" for engaging in "improper, unacceptable and clearly provocative behavior aimed at disrupting institu-

tional peace and order." Holsum/Seaboard Bakeries Personnel Action re: Carmelo Rivera Rodriguez, dated 10/14/93, *reprinted in* Appendix at 399. According to Holsum, during the week between the October 6, 1993, incident and the final warning, it followed its unual practice of conducting an investigation of the matter, which included interveiwing witnesses, documenting the interviews, and having supervisors record their own recollections.

The Board concluded that the October 14, 1993, final warning was an unfair labor practice. It reasoned, inter alia, that Holsum's justification for the disciplinary action was pretextual because the warning was issued just one day after the picture of Rivera and the Union representatives appeared in the newspaper while the incident that allegedly gave rise to the action had occurred more than a week earlier. *Holsum*, 320 N.L.R.B. at 838. We find that the Board's inference of an anti-union motivation lacks substantial support in the record. Although the timing of the action could have established a *prima facie* case, Holsum overcame the adverse inference by adequately explaining the delay in the issuance of the final warning. Specifically, it was able to document a practice of investigation and verification of charges of employee misconduct that readily explained the eight-day interval between the offense and the issuance of the warning. Moreover, the disciplinary action in this case was proportional to the level of Rivera's misconduct and consistent with his prior disciplinary record. Two months earlier, on August 12, 1993, Rivera had received a final warning for using obscene language and defaming and denigrating the company's supervisors.

Finally, it strikes us as highly unlikely that the publica-

tion of the photograph would have caused Holsum to take disciplinary action against Rivera. At the time it was published, Holsum was thoroughly aware of Rivera's pro-union activities. The caption under the picture did not mention Holsum; it did not identify Rivera as an employee of Holsum or as a member of the Union; rather, it merely identified him as a "guest" at a party celebrating a settlement agreement with an unrelated company.

II. SEPTEMBER 29, 1994, DISCHARGE

On September 29, 1994, Rivera was called to a meeting with three members of Holsum's management and read a final termination notice. The notice stated that he was being discharged because of his "defamatory, insulting and false remarks" about Holsum's products. This was a reference to statements Rivera had made to fellow employees to the effect that those products were "poisonous"; that he would not give them to his family; and that "not even pigs will eat them."

According to Holsum, it first learned of these statements in August 1994 when one of its employees, Teresa Perez, advised its vice president for manufacturing, Julio E. Vigoreaux, that Rivera had made derogatory comments about the bakery's products. The company insists that it had immediately launched an investigation into the matter, which included the taking of affidavits from employees who had heard Rivera make the remarks; and that with this confirmation in hand, it proceeded to discharge him. On the basis of evidence presented to an administrative law judge ("ALJ"), however, the Board concluded that Holsum's stated reason for discharging Rivera was pretextual and that Rivera had

actually been terminated because he was contemplating a renewed attempt to unionize the company.

That conclusion was based on the following findings of fact: In December 1993 or January 1994, Holsum learned that Rivera had charged that its products were poisonous and were unfit for his family or even for pigs. Seven or eight months later, in August 1994, Perez reported to the company that Rivera had described its products as unfit for both his family and pigs, but did not state that he had described them as poisonous; at the same time, she advised management that Rivera was considering the possibility of another union campaign. The Board noted that it was only then that Holsum launched the investigation that led to Rivera's dismissal. It reasoned that because the company had failed to take any disciplinary action following the earlier report that Rivera had made the more serious charge that its products were poisonous, it was the possibility of renewed union action, not Rivera's disparaging comments, that led Holsum to discharge him. *Holsum Bakers,* 320 N.L.R.B. at 834-37.

Whether Holsum's stated reason for discharging Rivera was pretextual turns on one basic question of fact: When did Holsum first learn that Rivera had described its products as poisonous? Holsum insists that it did not learn of these remarks until August 1994. The Board, however, maintains that Holsum had been advised of them no later than December 1993 or January 1994.

The relevant testimony was given by three employees: Carlos Hernandez, Mayra Rivera-Cabeza, and Perez. Hernandez testified that after the election, Rivera had repeatedly stated that he would not give Holsum products to his family

"because they had poison." Hearing Transcript ("Tr.") at 206. When asked on cross-examination if he remembered when the election was held, Hernandez said that he thought it was around June or July of 1994. Tr. at 210-11. The election, however, actually took place on September 23, 1993. Hernandez further testified that he reported Rivera's comments to his supervisors "as soon as" he first heard them. Tr. at 211-12. On re-direct examination, Hernandez asserted that the conversations he had with Rivera occurred around November 1994 (i.e., over a year after the election) or "perhaps before." Tr. at 217-18. Hernandez then testified that the negative comments were made "[i]n '94 when the elections were held, during the elections." Tr. at 218. Because of this confused testimony, the ALJ requested a copy of Hernandez's affidavit. The affidavit, which was sworn to on November 30, 1994, states, in part:

> [Rivera] would speak to me about a union he wanted to bring to the company. The union lost. I had to pass by him as part of my work and he would make negative remarks about the products. He would tell me that he did not buy the products, he would not give them to to [sic] his family, not even his grandchildren, because they had poison and they would poison them.... He made that remark to me approximately six times.... The first time he said that to me was between June and July of this year.

Affidavit of Carlos Manuel Hernandez, *reprinted in* Appendix at 439 (marginalia corrections included). The affidavit also states that Hernandez reported Rivera's statements to his immediate supervisor, Angel T. Santiago, and to Jose Sanchez of Quality Control. *Id.* at 440.

Rivera-Cabeza testified that she heard Rivera state that "that type of product could not even be given to pigs. And that anyone who were to eat that product could possibly [sic] him/herself." Tr. at 198. She claimed that Rivera began making these comments "after the elections were lost" in December 1993 to January 1994. Tr. at 200. Unlike Hernandez, Rivera-Cabeza did not report them to management.

Perez testified that on or about August 22, 1994, she told Vigoreaux that, during the prior month, Rivera had stated that he would not give Holsum products to his family, that they "were garbage, and that even the pigs did not eat them," Tr. at 222; and that Rivera was talking about the possibility of another union campaign. Tr. at 161. Perez did not testify that Rivera had described the food as poisonous.

Based on the testimony of these three witnesses, the Board determined that Holsum was aware of Rivera's "poison" comments as early as December 1993. *Holsum Bakers,* 320 N.L.R.B. at 837. Although the Board accepted Perez's testimony that Rivera made additional negative comments about the products in July 1994, it concluded that the investigation of those comments and the subsequent discharge occurred because of her report that Rivera was discussing the possibility of another union campaign. *Id.*

We find that there was sufficient evidence to support the Board's conclusion. Although Hernandez was confused as to dates, his testimony was consistent with regard to two essential points: Rivera had charged that Holsum's products contained poison shortly after the election, and Hernandez had reported them to management as soon as he had heard them. Moreover, Hernandez's testimony linking Rivera's out-

bursts with the election was corroborated by Rivera-Cabeza and not contradicted by Perez, who merely discussed additional, somewhat milder comments that Rivera had made at a later date.

III. CONCLUSION

For the foregoing reasons, we find that there is sufficient evidence in the record to support the Board's conclusion that Rivera's discharge constituted an unfair labor practice; but we can find no such evidence to support the Board's determination that Rivera's October 14, 1993, final warning was an unfair labor practice. According, the petition for review is granted in part and denied in part.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HOLSUM BAKERS OF PUERTO RICO, INC. Petitioner,	)	U. S. Court of Appeals For the District of Columbia Circuit
v.	)	MANDATE issued 3-26-97
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	FILED JAN 10 1997 No. 96-1065

JUDGMENT

Before: EDWARDS, Chief Judge, SILBERMAN, Circuit Judge, and BUCKLEY, Senior Circuit Judge

THIS CAUSE came on to be heard upon a petition filed by Holsum Bakers of Puerto Rico, Inc., to review an order of the National Labor Relations Board in Board Case Nos. 24-CA-6859, 24-CA-7041, and 24-RC-7575, issued on February 12, 1996, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on November 13, 1996, and has considered the briefs and transcript of record filed in this cause. On January 10, 1997, the Court being fully advised in the premises, handed down its decision enforcing in part, and denying in part an Order of the Board. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, Holsum Bakers of Puerto Rico, Inc., Toa Baja, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against any employee for supporting Congresso de Uniones Industriales de Puerto Rico or any other union.

(b) in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed t[illegible]m by Section 7 of the National Labor Relations Act ("the Act").

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Carmelo Rivera-Rodriguez immediate and full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the administrative law judge's decision.

(b) Remove any reference to the unlawful discharge of Carmelo Rivera-Rodriguez from its files and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(d) Post at its facility in Toa Baja, Puerto Rico, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 24 of the National Labor Relations Board (Toa Baja, Puerto Rico), after being signed by the Petitioner's authorized representative, shall be posted by the Petitioner in both English and Spanish, immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner has taken to comply.

IT IS FURTHER ORDERED that each party shall bear its own costs.

/s/ Harry T. Edwards

Chief Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ L.H. Silberman

Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ James Buckley

Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

APPENDIX

NOTICE TO EMPLOYEES POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives emplyees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice.
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, or otherwise discriminate against any of you for supporting Congresso de Uniones Industriales de Puerto Rico or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Carmelo Rivera-Rodriguez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges

previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed any reference to his discharge from our files and that the discharge will not be used against him in any way.

HOLSUM BAKERS OF PUERTO RICO, INC.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

NO. 96-1065 **SEPTEMBER TERM, 1996**

Holsum Bakers of Puerto Rico, Inc.,
Petitioner

v.

National Labor Relations Board,
Respondent

FILED
MAR 10 1997

BEFORE: Edwards, Chief Judge, Siberman, Circuit Judge, and Buckley, Senior Circuit Judge

O R D E R

Upon consideration of petitioner's petition for rehearing filed February 21, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

(2)

Supreme Court, U.S.
FILED
JUN 9 1997
OFFICE OF THE CLERK

NO. 96-1955

In the Supreme Court of the United States

OCTOBER TERM, 1997

HOLSUM BAKERS OF PUERTO RICO, INC.,
Petitioner,

VERSUS

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Holsum Bakers of Puerto Rico, Inc. *and* Congresso de Uniones Industriales de Puerto Rico, Cases 24-CA-6859, 24-CA-7041, and 24-RC-7575

February 12, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On September 14, 1995, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply to the answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.

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[1] In the absence of exceptions, we adopt pro forma the judge's overruling of the Union's objections to the conduct of the election.

Ismael Rodriguez-Izquierdo, Esq., for General Counsel.
Clyde H. Jacob III, Esq. (Kullman, Inman, Bee, Downing & Banta), for the Respondent-Employer.
Nicolas Delgado-Figueroa, Esq., for the Charging Party-Petitioner.

ORDER

The National labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Holsum Bakers of Puerto Rico, Inc., Toa Baja, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Hato Rey, Puerto Rico, on May 15-18, 1995, based on charges filed by Congresso de Uniones Industriales de Puerto Rico (the Union) on December 13, 1993 (Case 24-CA-6859), and October 3, 1994 (Case 24-CA-7041), and a consolidated complaint which ws issued by the Regional Director for Region 24 of the National Labor Relations Board (the Board) on November 30, 1994. The complaint allegations before me assert that Holsum Bakers of Puerto Rico, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by disciplining and discharging Carmelo Rivera-Rodriguez, its employee, because of his union or other protected concerted activities. Respondent's timely filed answer denies the commission of any unfair labor practices.

Consolidated for hearing with the unfair labor practice allegations were certain objections to an election conducted on September 23, 1993, in Case 24-RC-7575.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS— PRELIMINARY CONCLUSIONS OF LAW

The Respondent, a Puerto Rico corporation, is engages

in the manufacture and sale, at both retail and wholesale, of bread and other bakery products at its plant in Toa Baja, Puerto Rico. In the course of that business during the past year, it purchased and received goods and materials valued in excess of $50,000 which were transported to it in interstate commerce from points and places located outside of the Commonwealth of Puerto Rico. The complaint alleges, Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. *Union Activity and the Election*

Over the years, there have been at least six representation elections wherein the Union has sought to represent Respondent's production and maintenance employees. The most recent election, in Case 24-RC-7575, was conducted on September 23, 1993. The Union lost by a vote of 251 to 118, with 45 nondeterminative challenges, in a unit of approximately 450 eligible voters. Timely objections were filed; they will be considered infra.

Among those employees active on the Union's behalf was Carmelo Rivera-Rodriguez (Rivera). Rivera distributed and collected authorization cards, discussed the Union with other employees, spoke on the radio in five or six broadcasts to promote the Union's cause, and served as one of the

Union's observers at the election. Respondent stipulated to knowledge of Rivera's union activity.

The campaign gave rise to several unfair labor practice charges and allegations in additon to those at issue here. Those charges were settled informally, with Respondent admitting no unlawful conduct. However, Respondent stipulated that it bore animus toward the Union and the activities in its behalf.

B. *Rivera's Disciplinary Warnings*

On August 12, 1993, Rivera had received a "final" warning for using obscene language and defaming and denigrating the Company's supervisors. As set out in that warning, at the start of a shift, while standing by the timeclock in the presence of other employees, Rivera had stated, "These three sons of . . . (implying sons of bitches) are the ones we have to get out of here and they are dirty; Vigoreaux [vice president of manufacturing], Mena [director of human relations], Calderon . . . . Those are the ones that are stealing and have this screwed up."[1]

On October 6, 1993, when Supervisor William Sostre attempted to hand him his paycheck, Rivera told him: "Take it on to Mr. Vigoreaux." As Sostre and Jose Santiago, an employee, credibly described the incident, Sostre was only

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[1] This disciplinary action, issued before the election, was not alleged as a violation of the Act. According to Rivera, he denied the conduct when accused of it. Angel Sanitago, the supervisor who issued the warning, claimed that Rivera did not deny it but had merely asserted that he had been joking.

a few feet from Rivera when the tender was made.[2] On the following day, in the lunchroom, Rivera asked Anthony Green for his check. When told that Green did not have it, Rivera loudly and repeatedly told Green that "[y]ou're going to be worse than Vigoreaux . . . Vigoreaux . . . wants to keep my money."

Rivera did not deny the latter exchange but contended that his remarks were made in a joking, nonhostile, manner. The outburst was witnessed by two employees, Angel Nieves and Luz Cristobal. They credibly corroborated Green's description of a less-than-friendly exchange.[3]

Over the next several days, Respondent's supervisors took statements from the employees who witnessed these incidents. They also wrote out statements of their own observations.

On October 14, 1993, Rivera was issued a "final" warning for engaging in "improper, unacceptable and clearly provocative behavior aimed at disrupting institutional peace and order . . . a continuation of his" "insolence and insubordination." That warning followed, by a day, publication of a picture of Rivera, together with representatives of the Union, celebrating the conclusion of negotiations with another

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[2] Sostre described this as taking place as he went down the production line; Jose Santiago, however, recalled that it occured at the timeclock. I do not find that this discrepancy warrants that either otherwise credible witness be discredited.

[3] Nieves commented that, while Rivera had joked with him in the past, the instant comments did not appear to be jokes "because [they] began after the election" and the joking comments previously made "had nothing to do with the company."

Puerto Rico employer, Bacardi, in a newspaper of wide distribution in Puerto Rico. That picture had been noticed, and commented on, by Carmen Santiago, on October 14, 1993.[4]

On May 22, 1994,[5] Angel Santiago, cake plant superintendent, overheard Rivera speaking to a group of employees in the men's room, Rivera, he said, "made offensive and negative comments of all the plant supervisors" by saying: "that none of them was worth anything, that the only ones worth a little were Manuel Ortiz and Anthony Green." Angel Santiago placed a memorandum memorializing this observation in Rivera's personnel file. No discipline issued.

On June 8, Rivera was given a "final" warning for refusing another employee's request for assistance in an insulting and demeaning manner. Purportedly, he told her, "That is not my job . . . with six lazy women there and I have to do everything. . . . I am even going to have to do Mr. Vigoreaux's job." This conduct had occurred in May 12; it resulted in an investigation conducted by the supervisors wherein all of the alleged participants and witnesses, including Rivera, were questioned. When questioned, Rivera claimed that it was just a misunderstanding. He asserted that he had replied to the other employee's request.

> If I was the only person that worked in that area and I also asked her if Mr. Vigoreaux had also told her to

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[4] Rivera understood Carmen Santiago to be the uncle of Angel Santiago, cake plant superintendent. The record neither disputes nor corroborates his understanding.

[5] All dates hereinafter are 1994 unless otherwise specified.

> do his job . . . that all of us were paid for our work and that nobody worked for free; that we all had to do the work and that it was not fair that I alone did the work while five or six people were standing around without doing anything at that time.[6]

C. *Rivera's Discharge*

On what was probably July 20, cake department employee Teresa Perez hear Rivera say:

> [T]he products of the Company, he did not give them to any members of his family, to his wife, nor his children, nor to his grandchildren. That the products were garbage and that even the pigs did not eat them.

She described his demeanor since the election as often aggressive and indicative of him being upset. He sometimes mocked Vigoreaux when the latter came into the department by walking in a mincing, limp wristed manner behind Vigoreaux's back.

In early August, as he came through the department, Perez asked to speak with Vigoreaux.[7] Vigoreaux, who was in a hurry, asked to her wait until he had more time. He then

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[6] This incident, like the one of August 12, 1993, was not the subject of a complaint allegation. Both were introduced as background evidence, demonstrating a pattern of behavior and Respondent's practice of investigating such incidents.

[7] Perez, an otherwise credible witness, placed Rivera's remarks about June 20 and her conversation with Vigoreaux as having taken place in early July. I am convinced, from the timing of the other events, that she was mistaken and inadvertently backdated each event by 1 month, referring to June instead of July and July instead of August.

went on vacation. When he returned, about August 22, his secretary told him that Perez had spoken to her and had been referred to Mr. Mena, the vice president of industrial relations. Vigoreaux then contacted her. Perez told him that Rivera displayed a "very, very negative attitude," that Rivera did not like having Vigoreaux come into the department and that Rivera mocked and ridiculed Vigoreaux behind the latter's back when he did so. She said:

> Ever since he lost the election this person has changed. He is mad, he is angry . . . and now he's even talking bad about Company products. . . . she told me [Vigoreaux] that Carmelo has expressed to her that he doesn't eat Holsum products, that he doesn't give them to his wife . . . [or] grandchildren. That our products [are not fit for swine][8] . . . are no good.

Perez also told Vigoreaux that Rivera was apparently upset that the Union had lost the election, that no one had listened to him and was talking about the possibility of another union campaign. Perez was concerned about that, she explained, as she did not support the Union.[9] She also related that Rivera had called other employees lazy, upsetting and provoking them.

Vigoreaux, professing to be shocked at Perez' report of Rivera's comments about the products, asked Angel Santiago

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[8] The Spanish word used was "porqueria," a colloquialism translated by Vigoreaux as "filth" or "not fit for swine."

[9] When she had made a similar report to Mena, he told her: "Be at peace, because that is not going to happen here at Holsum ever." Mena went on to give her examples of companies which had gone bankrupt because of unions.

to determine whether there were any problems in that regard, particularly whether anyone was tampering with the products. He then directed Angel Santiago to question all of the employees on the donut line, ultimately expanding the interrogations to all of the employees in the department.

The employees were asked questions pursuant to a questionnaire prepared for that purpose. That questionnaire asked whether the employees were aware of the Employer's rules, whether they had mishandled the product or knew of anyone else who had done so, whether they had spoken badly of the product or knew anyone else who had done so, and whether they personally consumed Holsum products. It then asked, specifically, whether they had heard Rivera make derogatory comments about the product or say that he did not consume them or feed them to his family.

Of approximately 24 employees questioned, 6 reported that they had heard Rivera make negative statements about the products. Of these, two employees, Mayra Rivera-Cabeza and Carlos Hernandez related that Rivera had said that anyone eating the product could possibly "poison" himself or that the products "had poison." The employees signed the questionnaires. Those who had reported Rivera's negative statements were also questioned by an attorney on the Employer's behalf, with their responses recorded in signed and notarized statements.

There is no indication that any of the employees were asked about Rivera's continued promotion of the Union.

Neither did the questionnaire ask when Rivera had made adverse comments about the products. According to

Mayra Rivera-Cabeza and Carlos Hernandez, who had reported the "poison" comments, they had heard these from Rivera repeatedly in the months immediately after the election. However, they said, Rivera had ceased making such remarks by January 1994. As soon as he first heard Rivera make statements about the products, Hernandez had reported them to Angel Santiago and to Jose Sanchez, director of quality control. His testimony in this regard is uncontradicted. Apparently, Hernandez' report was ignored by management at that time.

When Rivera was questioned along with the other employees, he denied making the statements attributed to him, as he did in this hearing. Respondent chose not to believe him, noting his recent history of hostile or disrespectful conduct and the first-hand nature of the employees' reports. I similarly find that Teresa Perez, Mayra Rivera-Cabeza,[10] and Carlos Hernandez were more credible than Rivera and conclude that, at various times, Rivera made the negative remarks about Holsum's products which they attributed to him.

Vigoreaux expressed great concern because of Rivera's references to poison and "porqueria." He discussed this matter with the Employer's consultants on regulatory matters and eventually concluded that no report to the FDA was

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[10] Contrary to the General Counsel's claim on brief, Mayra (or Maria, as the record incorrectly reflects her name) Rivera-Cabeza testified in these proceedings and corroborated the information she had earlier provided to the Employer. I note that TR. 198, LL. 24-25, contains a significant error. It omits the word "poison" from the sentence, "That type of product could not even be given to pigs and that anyone who were to eat that product could possibly poison him/herself." I correct the record accordingly.

required.[11]

On September 29, Rivera was called into a meeting with Angel Santiago, Green, and Sanchez. They read him a final termination notice which referenced the employees' reports of what he had said about the products. His conduct, he was told, violated company policies against making malicious, mean-spirited, and threatening comments about its products and had been evaluated together with his history of prior unacceptable conduct. It also violated Federal law pertaining to false reports as to the wholesomeness of food products, he was told.[12]

D. *Analysis of 8(a)(3) and (1) Issues*

I am convinced that Rivera was a disgruntled employee, upset by the defeat of the Union in the most recent election and frustrated that his fellow employees saw fit to ignore his prounion importunings. He took out that frustration with expressions of contempt for the Employer, its supervisors, its products, and his fellow workers.

While the source of Rivera's contemptuous expressions apparently lay in the Union's electoral defeat, it would be stretching to call his negative comments union activity. They did not advocate support for the Union or seek improvements in wages, hours, or working conditions. Thus, they were neither union activity nor within the ambit of the "mutual

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[11] He claimed to have concerns of an incident like the infamous Tylenol poisoning case.

[12] Respondent cites the Federal Anti-Tampering Act, 18 U.S.C. § 1365, which makes criminal any knowing communication of false information that a consumer product had been tainted.

aid or protection" clause of Section 7 and were unprotected. See *Delta Health Center*, 310 NLRB 26, 43 (1993), and *Trover Clinic*, 280 NLRB 6 (1986). See also *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), where the Supreme Court held that a union's public attacks on the quality of an employer's product which were unconnected to the employees' working conditions or a current labor controversy were unprotected.

The *Burnup & Sims* and *Rubin Bros.* line of cases, urged as applicable by counsel for the General Counsel,[13] provides that:

> Where an employee is disciplined for having engaged in misconduct in the course of union activity, the employer's honest belief that the activity was unprotected is not a defense if, in fact, the misconduct did not occur. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964); *Rubin Bros. Footwear, Inc.*,99 NLRB 610 (1952).

Keco Industries, 306 NLRB 15, 17 (1992). As Rivera made the negative comments but not in the course of any union or other protected activity, I find this line of cases inapplicable to the instant situation.

The foregoing conclusions, however, do not resolve the critical question of the Employer's motivation in discharg-

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[13] Counsel for the General Counsel urged reliance on this line of cases contending that Rivera did not make the statements attributed to him. I have rejected that contention. *Rubin Bros.* and *Burnup & Sims* would still be applicable if I had found that Rivera was engaged in protected activity when he uttered his statements and that those statements did not cross the line into unprotected activity.

ing Rivera. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the analytical mode for resolving discrimination cases turning upon the employer's motivation. Under that test, the General Counsel must first:

> . . . make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Citations omitted.]
>
> *Fluor Daniel, Inc.,* 304 NLRB 970 (1991).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Inferences of discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences.

Adco Electric, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Asociacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

In this case, Rivera's union activity in regard to the prior election was stipulated to be known to the Employer, as was its animus. More significantly, in receiving its most recent report of Rivera's negative comments, Teresa Perez put Respondent on notice that Rivera was beginning to talk about yet another campaign for union representation. All of the elements of a prima facie case are thus present.

Was Rivera discharged for his comments or because he was seen to be renewing his union advocacy at a time when another election was a real possibility? I am compelled to conclude that Respondent has failed to rebut the General Counsel's prima facie case by showing that Rivera would have been discharged for what he had said even absent the union activity.[14] Respondent was aware, since December 1993 and January 1994, 6 to 8 months earlier, that Rivera had made the harshest, most critical of his statements, i.e., that the products were "poison." Yet, when his earlier statements had been reported to the manager most directly concerned with product quality, Jose Sanchez, and to the superintendent of his department, Angel Santiago, nothing had been done. It was not until Teresa Perez reported his less critical (i.e., without reference to "poison") comments, in conjunction with her observations that Rivera was upset

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[14] That burden only requires that Respondent establish its *Wright Line* defenses by a preponderance of the evidence. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

at the election result and was discussing the possibility of another campaign that an investigation was launched and disciplinary action taken. The delay in taking adverse action until after there is knowledge of renewed union activity evidences Respondent's unlawful motivation. See *Direct Transit*, 309 NLRB 629, 633 (1992), and *Tuskegee Area Transportation System*, 308 NLRB 251, 257 (1992) (delays of only 2 weeks involved in each case). I find that Rivera was discharged because of his renewed union activity, in violation of Section 8(a)(3), and not because of the negative statements he made regarding Respondent's products.[15]

For this same reason, I reject Respondent's contention that Rivera was validly discharged for violating its rules of conduct. I note, moreover, that there was no finding that he had violated the cited statute and that any conclusion that his rheroric amounted to a knowing communication that Respondent's products had been tainted would be strained. It is a violation of no law to say that one does not like a given line of products or feed them to his family, or to suggest that consumption of products which may be heavy in sugars or fats might be deleterious to one's health. Rivera's reference to "poison" could be interpreted to mean no more than that. See Martin Marietta Corp., 293 NLRB 719 (1989). Such an interpretation would negate any inference that his statements were malicious.

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[15] Having so concluded, I find it unnecessary to determine whether, if Rivera were to be considered as engaged in union activity when he made those statements, they were so disloyal, reckless, or maliciously untrue as to lose the Act's protections. But see *Delta Health Center*, 310 NLRB 27, 43 (1993), *Cincinnati Suburban Express*, 289 NLRB 966, 967 (1988), and *Trover Clinic*, 280 NLRB 6 (1986).

I would note further that to the extent that Respondent contends that Rivera's discharge was the result of violations of its rules pertaining to "Public Relations and Company Reputation," those rules appear to be unduly broad and violative of Section 8(a)(1). See *Cincinnati Suburban Press*, 289 NLRB 966 fn. 2, 967, and 975 (1988), and cases cited therein. As held therein, rules which prohibit "false . . . statements concerning any employee, supervisor, the Company, or its products" and "[u]nlawful, improper or unseeming conduct . . . affecting the Company's product reputation or goodwill" violate Section 8(a)(1) because they fail to clearly define the area of permissible conduct to employees and thus might cause them to refrain from protected activities. The rules relied upon by Respondent in the discharge notice and/or in its brief, similarly prohibit dissemination of "defamatory or disparaging information" about, or "making any false representation concerning . . . our products, or management." Any such rules, the Board held, must be "narrowly tailored, unambigous, and designate the category of employees to whom the rules are applicable . . . [and] not improperly impinge on the relevant rights of the affected employees' " Respondent's rules are not so limited.

Applying the same *Wright Line* analysis, I also conclude that the warning issued to Rivera in October 1993 was motivated by his union activity. I note that Respondent delayed for at least a week after the paycheck incident before issuing that warning and issued it only 1 day after his picture had appeared in the local press, showing him with union representatives celebrating the successful culmination of negotiations at another major Puerto Rican employer' Moreover, I cannot accept that Respondent's supervisors and managers were so thin-skinned as to actually deem this little

demonstration of pique, however irrational it may have seemed, as "provacative behavior aimed at disrupting institutional peace and order."

D. *The Objections*[16]

1. Objection 2—References to the DuPont Plaza fire

Several years ago, a tragic fire at the DuPont Plaza Hotel in Puerto Rico claimed 93 lives. The fire had been started by members of a different union, apparently upset at the pace of negotiations. Three members of that union pleaded guilty to setting the fire.

Shortly before the election at Holsum, the Employer posted clippings about the DuPont Plaza fire which had been culled from Puerto Rico newspapers. They bore the captions "This is the result of only one meeting to call for a strike vote."

The Employer showed a video about the fire at a preelection meeting held on September 20, 1993,[17] and Vigoreaux also spoke about the fire at one meeting. He told the employees:

> It seems there is a coincidence here of fires as a result of the collective bargaining process, between a union and an employer or at the moment in which a strike is imminent: At Gayley Rico

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[16] As I read the objections and Board's Order, my consideration of the objections is limited to the specific subjects discussed below.

[17] The record contains no details of this video.

> during the strike voted by the Congresso,[18] as well as in the case of the DuPont Plaza. Unfortunately, when a union gets into a company you cannot know what type of problems you will encounter.

Although the record does not establish when he said it, Vigoreaux also told employees that the Employer would bargain in good faith if the Union won the election. He told them, in the course of that discussion, that

> . . . the demands of the Union could be so high that the Union and the Company cannot have a meeting of the minds, and there may be a stalemate. And that as a result of stalemate, history states that some unions have called strikes. And as a result of strike. . . there may be violence. . . . Our preference would . . . that we get together and resolve things in a peaceful way.

I do not find, in the foregoing, any threat that the Employer would bargain in bad faith or reject all union demands and place the Union in a position wherein it would have to strike in order to reach agreement. *Novi American*, 309 NLRB 544, 545 (1992). Neither do I find any threat that a fire, or other violence, was the necessary result of collective bargaining. Holsum's clippings and statements accurately related the fact that fires had occurred in two negotiations in Puerto Rico, at least one of which was directly and provably caused by union members. The Employer may have suggested that unions were responsible for fires during some negotiations by it did not suggest that such a consequence

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[18] Some years earlier, the Gayley Rico plant had burned down during a work stoppage by the Congresso de Uniones Industrales de Puerto Rico. The Union denied responsibility for that fire in the hearing before me.

was always the result of collective bargaining. It certainly did not suggest that it would cause such a fire or bargain in such a way that this Union might be provoked into a violent act. In the absence of a prediction that an event similar to the DuPont Plaza fire would occur at Holsum in the event of a union victory, Vigoreaux's remarks are permissible under Section 8(c). *Blue Grass Industries,* 287 NLRB 274, 276 (1987).

Accordingly, I shall recommend that Objection 2 be overruled.

2. Objection 5—Parties

On September 22, 1993, the day before the election, the Employer held a theme lunch "festival" in the employee cafeteria. Ethnic food was served buffet style and there was music. The lunch period was not extended but the price charged, $2.70 per person, was less than the usual $3.50 to $4 charged for lunches. Such ethnic "festivals" were regular custom of Holsum; they were put on several times per year. The record does not reflect whether there was any set schedule for them. Neither does the record reveal any evidence of campaigning at this festival.

About September 20, 1993, the Employer announced that there would be a party at the plant after the votes were counted. The party was to be held without regard to who won and everyone was invited.[19] Some employees who had a

[19] The Petitioner introduced only hearsay evidence that the party was to be held only in the event the Union was defeated; Vigoreaux credibly disputed that evidence, noting that he would not excpect the loosers to come and that, had the Employer lost, it would have been a sad party.

band were hired, on an informal basis, to provide music. They set up in the cafeteria (above the production floor where the voting was conducted) between the first and second voting sessions and were observed by some employees while they did so. The party began about 45 minutes after the polls closed. It cost the Employer less than $4000, perhaps $7 per voter, and the employees who were scheduled to work on the next day were expected to do so.

As the Board stated in *B & D Plastics,* 302 NLRB 245 (1991):

> Our standard in preelection benefits cases is an objective one. . . .To determine whether granting the benefit would tend to unlawfully influence the outcome of the election, we examine a number of factors, including: (1) the size of the benefit conferred in relation to the purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive. It has, however, permitted the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits. [Citations omitted.]

In that case, the employer held a cookout prior to the election to which all employees were invited. That cookout was intended as a campaign function where the employer delivered its final antiunion message. Whether they

attended or not, all employees received a day off with pay. The employer justified its conduct by contending that it had no other way to end its campaign, a justification the Board rejected, noting that there were alternative means for that employer to deliver its message. The Board found the conduct objectionable, noting that a substantial benefit was conferred on the employees who would reasonably view that benefit as intended to influence their votes in favor of the employer.

In this case, a lunch "festival" was provided on the day before the election. That lunch, however, was made available to all emplyees, it was consistent with the Employer's past practice, it was not free but only offered at a discount from the usual lunchroom prices, and it was not used as a campaign vehicle. The postelection party, announced before the election and held immediately after, was more directly connected to the election. However, it was open to all employees without regard for how they voted, it was of only nominal value to each of the employees, it did not entail any paid time off, and the Employer's justification, that it was intended to rebuild morale regardless of who won the election, is both credible and reasonable. I find Holsum's conduct distinguishable from that of the employer in *B & D Plastics*, and not objectionable.

3. Objection 6—Supervisory campaigning

On the morning of September 22, according to Rivera, Vigoreaux, and another supervisor, Juan Hernandez, stood in front of the shipping office passing out "Vote No" ("VOTA NO") stickers to employees as they filed by. The stickers were about 2 inches square, orange with black lettering. The employees, he said, affixed them to their hats or blouses.

Vigoreaux and the other supervisor continued to distribute them, he said, for about 25 minutes.

Vigoreaux denied that he was passing those stickers out. He was putting up rows of them on the office windows, where employees could come by and take them. As he stood outside an office for only 5 to 10 minutes, he said, employees came up to him and asked for them. I credit Vigoreaux, noting the absence of any evidence of employees, other than Rivera, to support the contention that Vigoreaux actively passed them out rather than merely honoring employees' requests for them.

The essence of the objection to such conduct is that it may constitute subtle interrogation or polling of employee proclivities. *Kerr-McGee Chemical Corp.*, 311 NLRB 447 (1993). It is not that supervisors may not engage in campaigning to present their employer's views or preferences; clearly, they may. That campaigning, the Board has held, may include making procompany insignia available, so long as there is an "absence of supervisory involvement in the distribution process or other evidence that management pressured employees into making an observable choice or open acknowledgment concerning their campaign position." *Schwartz Mfg. Co.*, 289 NLRB 874, 879 (1988). In that case, management encouragement that employees take and wear hats with the company logo and the furnishing of such hats and "Vote No" buttons (distributed by a nonsupervisory individual) was held to be neither 8(a)(1) nor objectionable. Cited with approval in *Schwartz* was *McDonald's*, 214 NLRB 879, 881-882 (1974), where no violation was found when management personnel wore "Vote No" pins "and generally had additional pins handy to give employees."

I find that the provable conduct of Vigoreaux and Hernandez falls within the limits of *Schwartz* and *McDonald's*. Merely making the "Vote No" stickers available, or honoring employee requests for them, is not unlawful or objectionable polling or interrogation under prevailing Board precedent.

CONCLUSIONS OF LAW

1. By disciplining and discharging Carmelo Rivera-Rodriguez, an employee, because of his union activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. The Respondent engaged in no conduct warranting that the election conducted in Case 24-CA-7575 on September 23, 1993, be set aside and the Petitioner's objections to the conduct of election must be overruled.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950),

plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Holsum Bakers of Puerto Rico, Inc., Toa Baja, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining, discharging, or otherwise discriminating against any employee for supporting Congresso de Uniones Industriales de Puerto Rico or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Carmelo Rivera-Rodriguez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove any reference to the unlawful discipline and discharge of Carmelo Rivera-Rodriguez from its files and notify the employee in writing that this has been done and that the discipline and discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the tems of this Order.

(d) Post at its facility in Toa Baja, Puerto Rico, copies of the attached notice marked "Appendix."[21] Copies of the notice on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent, in both English and Spanish, immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the objections to the conduct of the election in Case 24-CA-7575 be overruled.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discipline, discharge, or otherwise discriminate against any of you for supporting Congresso de Uniones Industriales de Puerto Rico or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Carmelo Rivera-Rodriguez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and **WE WILL** make whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed any reference to his October 14, 1993 warning and his discharge from our files and that the warning and discharge will not be used against him in any way.

HOLSUM BAKERS OF PUERTO RICO, INC.

Supreme Court, U.S.
FILED
AUG 7 1997
CLERK

No. 96-1955

In the Supreme Court of the United States

OCTOBER TERM, 1996

HOLSUM BAKERS OF PUERTO RICO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by discharging an employee because he was discussing renewal of a campaign to organize petitioner's employees.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is unpublished, but the decision is noted at 107 F.3d 922 (Table). The decision and order of the National Labor Relations Board (Supp. App. A1-A2) and the decision of the administrative law judge (Supp. App. A3-A28) are reported at 320 N.L.R.B. 834.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1997. A petition for rehearing was denied on March 10, 1997. Pet. App. A17-A18. The petition for a writ of certiorari was filed on June 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a bakery in Puerto Rico, employed Carmelo Rivera-Rodriguez (Rivera) as a general helper in its production department. Pet. App. A3. In 1993, Rivera was active in a union organizing drive among petitioner's employees. That drive culminated in defeat for the union in an election held in September 1993. *Ibid.*; Supp. App. A3-A5.

In late 1993 or early 1994, after the union election, an employee reported to petitioner that Rivera had stated that he would not buy petitioner's products or give them to his family "because they had poison and they would poison them." Pet. App. A8; see *id.* at A7-A10, Supp. App. A10-A11, A15. Petitioner took no disciplinary action against Rivera at that time. Pet. App. A7; Supp. App. A15. In August 1994, with the anniversary of the union's election defeat approaching, another employee reported that Rivera had said that he would not give petitioner's products to his family, that they "were garbage, and that even the pigs did not eat them." Pet. App. A9; Supp. App. A9. That employee also reported that Rivera was discussing the possibility of a second union campaign. Pet. App. A7, A9; Supp. App. A9. Petitioner then conducted an investigation, at the end of which it discharged Rivera on September 29, 1994. Supp. App. A9-A12; Pet. App. A6, A9.

2. In subsequent proceedings before the National Labor Relations Board (Board), an administrative law judge (ALJ) found that Rivera had made the negative comments alleged by petitioner, and that in doing so he was not engaged in activity protected by the National Labor Relations Act. Supp. App. A11-A13. The ALJ pointed out, however, that petitioner had

stipulated both that it was aware of Rivera's union activity and that it was hostile to the union and to activities on its behalf. *Id.* at A5, A15. The ALJ held that those stipulations, together with the evidence that petitioner had discharged Rivera shortly after being informed that he was talking about renewing the campaign for union representation, made out a prima facie case that petitioner had discharged Rivera on account of his union activity. *Id.* at A14-A15.

The ALJ concluded that petitioner had failed to rebut the resulting inference of improper discharge, because it had not shown that Rivera would have been discharged in any event. Supp. App. A15. In particular, the ALJ noted that although Rivera's most critical statements, including that petitioner's products were "poison," were reported to petitioner by early 1994, petitioner took no action against Rivera until several months later, when it learned of less critical comments that were coupled with statements raising the possibility of another union campaign. *Id.* at A15-A16. Given the sequence of events, the ALJ found that "Rivera was discharged because of his renewed union activity, * * * and not because of the negative statements he made regarding [petitioner's] products." *Id.* at A16. The ALJ therefore recommended entry of an order requiring petitioner, among other things, to offer Rivera reinstatement and make him whole for any loss of earnings resulting from his discharge. *Id.* at A24-A28.[1]

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[1] The ALJ also concluded that a separate disciplinary warning issued to Rivera was motivated by his union activity. Supp. App. A17-A18. The court of appeals held that there was

The Board affirmed the ALJ's findings and adopted his recommended order. Supp. App. A1-A2.

3. The court of appeals enforced the Board's order in relevant part. Pet. App. A1-A14; see note 1, *supra*. After reviewing the record (Pet. App. A7-A10), the court held that there was sufficient evidence to support the Board's conclusion that petitioner's stated reason for discharging Rivera was pretextual, and that he was actually fired because he was contemplating a renewed attempt to unionize the company (*id.* at A6-A7, A9-A10).

ARGUMENT

1. Petitioner contends (Pet. 8-10) that Rivera's statements disparaging petitioner's product removed him from the protection of the National Labor Relations Act. It is true that an employer may, without violating the Act, discharge an employee who publicly disparages the employer's product, if the discharge is based solely on that conduct and the conduct is unrelated to the employee's working conditions or to a current labor dispute. See, *e.g.*, *NLRB* v. *Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 471 (1953) ("sharp, public, disparaging attack" on quality of employer's broadcasts was "cause" for discharge under 29 U.S.C. 160(c)); *George A. Hormel and Co.* v. *NLRB*, 962 F.2d 1061, 1064 (D.C. Cir. 1992) ("Nothing in the Act prevents an employer from disciplining or discharging an employee for disloyalty."). In this case, the Board agreed that Rivera's dis-

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insufficient evidence to support that conclusion (Pet. App. A4-A6), and it is not at issue here. The ALJ's rejection, in a consolidated proceeding, of various objections lodged by the union with respect to the 1993 election (Supp. App. A3, A18-A24) are likewise not at issue.

paragement of petitioner's products was unprotected. Supp. App. A1, A12-A13. It found, however, that petitioner discharged Rivera, not because of that disparagement (which was confined to remarks made to fellow employees, who were evidently familiar with Rivera's status as a disgruntled union partisan), but because of his protected union activity. *Id.* at A15-A16. On that view of the facts, Rivera's discharge plainly violated the Act. The court of appeals found sufficient evidence in the record to support the Board's factual conclusion (Pet. App. A9), and the matter does not merit further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. Petitioner particularly protests the Board's order that Rivera be reinstated. See Pet. 9-13. That argument comes too late. Petitioner has not previously challenged reinstatement as an appropriate remedy, either before the Board or before the court of appeals, and the court of appeals did not address the issue of its own accord. Petitioner may not raise the issue for the first time in this Court. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Indeed, because the remedial issue was not raised before the Board, this Court lacks jurisdiction to consider it. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (applying 29 U.S.C. 160(e) ("[N]o objection that has not been urged before the Board * * * shall be considered by the court [of appeals], unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.")).[2]

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[2] Petitioner's general exception to the ALJ's recommended order was not sufficiently specific to preserve the remedial issue. See *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255-

In any event, petitioner's arguments against reinstatement are without merit. Although the ill-tempered griping reflected by the ALJ's findings of fact might have justified petitioner in disciplining or even terminating Rivera, had petitioner in fact acted on that basis (compare Pet. App. A4-A6), it bears scant resemblance to the illegal strike or picketing activity at issue in the Board decisions that petitioner cites (Pet. 8-10). Nor is this case, which involved Rivera's reinstatement as a "general helper" in petitioner's bakery (Pet. App. A3), similar to *Diamond Walnut Growers, Inc.* v. *NLRB*, 113 F.3d 1259 (D.C. Cir. 1997) (en banc), which upheld an employer's decision to assign an employee returning voluntarily from a strike to a different type of job because her public distribution of leaflets alleging that the employer's "scab" workers "packaged walnuts contaminated with 'mold, dirt, oil, worms and debris'" (*id.* at 1261) would have presented "a rather acute and unusual conflict of interest" with her previous quality-control responsibilities, *id.* at 1268.[3] With regard to petitioner's attempted reliance (Pet. 10) on the Federal Anti-Tampering Act, 18 U.S.C. 1365(c)(1), the ALJ correctly observed that there has never been any finding that Rivera violated that Act, and that "any conclusion that his rhetoric amounted to a knowing communication that [petitioner's] products had been tainted would be strained." Supp. App. A16.

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256 (1943); see also *May Dep't Stores Co.* v. *NLRB*, 326 U.S. 376, 386 n. 5 (1945).

[3] Even if the decision in this case did conflict with that of the same court in *Diamond Walnut*, the matter would be one for resolution by the court of appeals. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

And, finally, this Court has made clear that the Board may order an employee's reinstatement even if it concludes, as the ALJ did in this case (*id.* at A11), that the employee has testified falsely in proceedings before the Board. *ABF Freight System, Inc.* v. *NLRB*, 510 U.S. 317, 323-325 (1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1997